REMARKS

Reconsideration and allowance of the subject application in view of the foregoing amendments and the following remarks is respectfully requested. Entry of this Amendment under Rule 116 is merited as it raises no new issues and requires no further search.

Claims 1-13 and 22-29 are pending in the application. Claim 30 has been cancelled without prejudice or disclaimer. No new matter has been introduced through the foregoing amendments.

The *35 U.S.C. 112, second paragraph* rejection of claim 30 is moot as claim 30 has been cancelled. It should be noted that the above amendment has been made solely for the purpose of expediting prosecution and are not necessitated by the Examiner's rejection.

The *35 U.S.C. 103(a)* rejection of claims 1-13 and 22-30 is traversed, because a prima facie case of obviousness has not been properly established.

Office personnel should establish a prima facie case of unpatentability considering the factors set out by the Supreme Court in *Graham v. John Deere. See*, e.g., *In re Bell*, 991 F.2d 781, 783, 26 USPQ2d 1529, 1531 (Fed. Cir. 1993) ("The PTO bears the burden of establishing a case of prima facie obviousness."); *In re Rijckaert*, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993); *In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966), requires that to make out a case of obviousness, one must (A) determine the scope and contents of the prior art; (B) ascertain the differences between the prior art and the claims in issue; (C) determine the level of skill in the pertinent art; and **(D) evaluate any evidence of secondary considerations**.

In this particular case, Applicants submitted on April 4, 2005 a Rule 132 Declaration showing Commercial Success which is important evidence of secondary considerations. *See Akzo N.V. v. U.S. Int'l Trade Comm'n,* 808 F2d. 1471, 1USPQ2d 1241 (Fed. Cir. 1986) ("Commercial

success is...a strong factor favoring non-obviousness."). The Declaration has not been indicated to be properly considered by the Examiner in the Final Office Action. *See*, for example, pages 3-7 of the Final Office Action. Thus, at least one of the *Graham* factors has not been met. The Examiner's *35 U.S.C. 103(a)* rejection is inappropriate for failing to establish a prima facie case of obviousness, and should be withdrawn.

Applicants further submit that the finality of the outstanding Office Action is premature, because the Examiner has failed to follow proper USPTO practice and procedure.

"[E]vidence traversing rejections, when timely presented, **must** be considered by the examiner whenever present. All entered affidavits, declarations, and other evidence traversing rejections are acknowledged and **commented upon by the examiner in the next succeeding action**." *MPEP*, section 716.01 (emphasis added).

In this case, Applicants timely filed the Rule 132 Declaration (April 4, 2005) well before the date (June 28, 2005) of the Final Office Action. Therefore, the Declaration must be considered and commented upon by the Examiner. Since the Examiner has failed to give any consideration to the Rule 132 Declaration, the outstanding Office Action and its finality are absolutely improper and should be withdrawn/vacated.

The Examiner's response to Applicants' arguments is noted, but deemed non-persuasive in view of the important evidence of Commercial Success submitted in the Rule 132 Declaration.

Accordingly, all claims in the present application are believed patentable over the applied art of record. Early and favorable indication of allowance is courteously solicited.

The Examiner is invited to telephone the undersigned, Applicant's attorney of record, to facilitate advancement of the present application.

To the extent necessary, a petition for an extension of time under *37 C.F.R. 1.136* is hereby

made. Please charge any shortage in fees due in connection with the filing of this paper, including extension of time fees, to Deposit Account 07-1337 and please credit any excess fees to such deposit account.

Respectfully submitted,

LOWE HAUPTMAN & BERNER, LLP

Randy A. Noranbrock *for:* Benjamin J. Hauptman
Registration No. 42,940 Registration No. 29,310

USPTO Customer No. 22429
1700 Diagonal Road, Suite 310
Alexandria, VA 22314
(703) 684-1111 BJH/KL/klb
(703) 518-5499 Facsimile
Date: September 28, 2005

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